INDEX

530-786—74—1

CITATIONS

Page

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-17A)[1] is reported at 476 F. 2d 546. The supplemental decision and amended order of the Board (Pet. App.

[1] "Pet. App." refers to the appendix to the petition. "Op. App." refers to the appendix to the brief in opposition. "A." refers to the separate appendix to the briefs.

26A–44A) are reported at 191 NLRB 886. The earlier decisions of the court of appeals (A. 23–27) and of the Board (Op. App. 1a–7a; A. 3–22) are reported at 433 F. 2d 541 and 172 NLRB 2231, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18A–23A) was entered on April 26, 1973. The Board's timely petition for rehearing was denied on May 30, 1973 (Pet. App. 25A). The petition for a writ of certiorari was filed on August 28, 1973, and was granted on December 3, 1973 (A. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a remedial order of the National Labor Relations Board which is challenged by the charging party as inadequate to effectuate the purposes of the Act is entitled to the same respect by a reviewing court as an order challenged as going further than necessary to effectuate those purposes.

2. Whether the court of appeals exceeded its authority as a reviewing court by substituting its judgment for that of the Board concerning the appropriate remedy for unfair labor practices.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> SECTION 8(a) It will be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SECTION 10

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * for the enforcement of such order * * *. Upon the filing of such petition, the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *

530-786—74—2

STATEMENT

A. THE INITIAL PROCEEDINGS

This case was twice before the Board. In the first proceeding, the Board determined that Heck's Inc., had engaged in unfair labor practices in resisting, at its Clarksburg, West Virginia, retail store, the organizational drive of the respondent union. The Board found that Heck's had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interrogating and threatening employees concerning the union and by polling employees by a non-secret ballot to determine their support for the union, and that it had violated Section 8(a) (5) and (1) of the Act, 29 U.S.C. 158(a) (5) and (1), by refusing to recognize and bargain with the union despite the existence of valid authorization cards from a majority of the employees (Op. App. 2a, 5a).[2]

[2] The Trial Examiner, finding that the General Counsel had failed to prove that the company lacked a good faith doubt of the union's majority status, had dismissed the refusal-to-bargain allegation of the complaint. The Trial Examiner noted that "in at least three preceding cases arising in other stores * * * the Company's challenge to card majorities proved well-founded" (A. 17). He recommended a bargaining order only to remedy the Section 8(a)(1) violations, which he found had "destroyed the Union's previously existing majority status" (A. 18).

The Board found that the company's "extensive violations of the Act and its interference with the employees' free choice in the Board's conducted election, clearly evidence its unlawful motive and justify an inference of bad faith" (Op. App. 4a). Accordingly, it concluded that the company's refusal to bargain violated Section 8(a)(5) of the Act. The Board further found that the company's Section 8(a)(1) violations "made a free and fair election impossible" (Op. App. 5a). It thus agreed with the Examiner that, in any event, a bargaining order was appropriate to remedy those violations (*ibid.*).

The Board ordered Heck's to cease and desist from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. The Board also ordered the company to bargain with the union as the representative of the employees at its Clarksburg store and to post appropriate notices at each of its 11 stores (Op. App. 6a–7a). The Board denied the union's request for additional remedies, finding it "inappropriate in this proceeding to grant this request to depart from our existing policies with respect to remedial orders" (Op. App. 2a, n. 2).

The court of appeals enforced the Board's order against the company (A. 23–27). It remanded the case to the Board, however, for reconsideration of the union's request for additional remedies,[3] in light of the court's recent decision in *Tiidee.*[4] In that case, the court had remanded to the Board for further consideration a union's request for similar extraordinary remedies where the company's "refusal to bargain was a clear and flagrant violation of the law" and "its objections to the election were patently frivolous" (426 F. 2d at 1248).

[3] The union requested the mailing of notices to employees; either a company-wide bargaining order or a shifting of the burden of proof in future cases to require Heck's to show good faith in rejecting union cards; injunctions under Section 10(j) of the Act; greater union access to employees; compensation to employees for collective bargaining benefits lost by delay; and reimbursement of union expenses incurred to overcome the effects of the company's unlawful refusal to bargain (A. 26, n. 7).

[4] *International Union of Electrical, Radio and Machine Workers, AFL–CIO* v. *National Labor Relations Board* (*Tiidee Products, Inc.*), 426 F. 2d 1243 (C.A. D.C.), certiorari denied, 400 U.S. 950.

B. THE BOARD'S SUPPLEMENTAL DECISION

On remand, the Board amended its original order by granting some of the additional remedies requested by the union. It directed the company to mail notices of the Board's amended order to the homes of all employees at each of the company's locations; to provide the union, for a period of one year, with reasonable access to plant bulletin boards at all company locations for the posting of union notices, bulletins, and other organizational literature; and to furnish the union with a list of the names and addresses of all company employees at all store locations, to be kept current for a period of one year (Pet. App. 41A–42A).

The Board denied the further relief sought by the union, including its request that it be reimbursed for organizational costs and litigation expenses incurred by reason of Heck's unlawful conduct (Pet. App. 38A–39A).[5] Respecting the latter, the Board was not "unmindful of the probability that the Charging

[5] The Board also denied the union's request for a company-wide bargaining order, because the union had never claimed that it represented a majority of all Heck's employees. "Although the Respondent's unfair labor practices have been widespread, aggravated, and pervasive, they have not in our opinion been so widespread, pervasive, or aggravated as to warrant such extraordinary relief" (Pet. App. 34A). The Board denied the union's additional request that the employees be made whole for loss of collective-bargaining benefits. The Board stated that, even if it possessed the authority to grant such relief, this would not be an appropriate case in which to exercise it; unlike the situation in *Tiidee*, *supra*, where the refusal to bargain rested on "patently frivolous" issues, the refusal here rested on "debatable" issues (Pet. App. 36A–37A).

Party has spent more money on organizational costs and attorney's fees than it would have spent had the Respondent not refused to bargain" (Pet. App. 38A). It concluded, however, that it would not "effectuate the policies of the Act to require reimbursement with respect to such costs in the circumstances here" (*ibid.*).

The Board explained that the appropriateness of these reimbursement requests must be considered in the light of "the role of a charging party under the statutory scheme," and the basic principles that "Board orders must be remedial not punitive"[6] and that "collateral losses are not considered in framing a reimbursement order"[7] (Pet. App. 38A–39A). The Board added (Pet. App. 39A):

> [T]he statutory scheme involves an interblending of public and private interests, and the participation of a charging party in the proceedings, before the Board and in the courts, can serve a public as well as its own private interests. Nonetheless, it is the Board which has been given primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging party's participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interests. Given this statutory framework, we conclude that the pub-

[6] Citing *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 11–12.

[7] Citing *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 364.

lic interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.[8]

C. THE SUPPLEMENTAL DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's amended order and agreed in part with the Board's rejection of the union's other requests for extraordinary relief. It concluded, however, that reimbursement of organizational costs and litigation expenses would be appropriate in the circumstances of this case. Rather than remanding the case for further consideration of those remedies in light of its opinion, the court enlarged the Board's order to include such reimbursement and remanded solely for a compliance-stage determination of the amounts involved (Pet. App. 17A, 21A).

The court rested its decision with respect to reimbursement on its reading of the Board's supplemental decision in *Tiidee* (A. 28–42), which was issued subsequent to the Board's supplemental decision in this case.[9] As the court viewed it, the Board in *Tiidee* retreated from its rationale in the present case by

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[8] Citing *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717.

[9] The *Tiidee* case is again pending on petition for review in the Court of Appeals for the District of Columbia Circuit, Nos. 72–1080, *et al.*, argued September 24, 1973.

ordering reimbursement of a union's litigation expenses by an employer who interposed patently frivolous defenses to an unfair labor practices complaint. Although the Board had never suggested that Heck's defenses in this case were insubstantial, the court reasoned that "the considerations which motivated the Board to give this enlarged relief in *Tiidee* are also operative here" (Pet. App. 9A–10A). The court stated (*id.* at 10A):

> It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief.

Similarly, the court thought that *Tiidee* signaled a shift in the Board's position with respect to reimbursement of excess organizational costs (Pet. App. 11A). The court attached controlling significance to the fact that the Board in *Tiidee,* while refusing to order such reimbursement, found it sufficient to observe that there was "no nexus between Respondent's unlawful conduct * * * and the Union's preelection organizational expenses" (A. 35). The court reasoned that, since the Board acknowledged the probability of such a nexus in the present case, "we think that provision for such costs should have been included in the remedies fashioned by the Board on remand" (Pet. App. 11A).

SUMMARY OF ARGUMENT

I

"In fashioning its remedies [under the Act] * * * the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *National Labor Relations Board* v. *Gissel Packing Co.,* 395 U.S. 575, 612, n. 32. Thus, the Board's choice of remedy may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U.S. 533, 540. These principles apply whether the reviewing court is asked to limit a Board order or, as here, to broaden the Board's remedial provisions. In either case, the controlling consideration is that Congress has left it to the agency's discretion to determine what relief is necessary to cure the violations found, and that discretion comprehends deciding not only what is necessary but also what is unnecessary.

II

The Board's decision not to award litigation and organizational expenses occasioned by the company's unfair labor practices was a reasonable exercise of the Board's broad remedial power. By rejecting the Board's judgment that such remedies were not warranted here, the court below exceeded its reviewing authority.

A. The structure of the Act places primary responsibility for enforcing its provisions on the Board; the participation of the charging party in Board litigation is essentially directed to protecting its own interests. In these circumstances, the Board, in the exercise of its broad discretion to fashion appropriate remedies for unfair labor practices, reasonably concluded that counsel fees should not be awarded in this case. Its determination is consistent with the general rule of American law that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor" (*Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717).

Contrary to the view of the court below, the Board's reliance on this reasoning in the present case was not undercut by its subsequent decision in the *Tiidee* case (A. 28-42). In *Tiidee* the Board ordered reimbursement of litigation expenses where the respondent's defenses to the unfair labor practice charges were "patently frivolous" (A. 34-35). Frivolous litigation clogs the already crowded Board and court dockets, thereby preventing the expeditious handling of meritorious cases, and no legitimate private interest is served by permitting such litigation to be freely maintained.

But where the respondent, though charged with serious misconduct, tenders a plausible and substantial defense, as did the employer in this case, the public interest in uncrowded Board and court dockets and the private interest of the charging party collide with

the right of the respondent to obtain an adjudication of the issues he presents. The Board reasonably concluded that the competing interests call for a different balance in the former situation than they do in the latter situation. Nothing in *Tiidee* supports the court of appeals' reading of that decision to require an award of litigation expenses when a party's *conduct,* despite the substantiality of his asserted defenses, is aggravated or pervasive.

B. The Board's refusal to require that respondent be reimbursed for its excess organizational expenses was predicated on the subordinate "role of the charging party" in the scheme of the Act, and the basic principles that "Board orders must be remedial not punitive" and that "collateral losses are not considered in framing a reimbursement order" (Pet. App. 39A). The court of appeals mistakenly concluded that it was inconsistent of the Board to deny organizational expenses for these reasons here while denying them in *Tiidee* on the ground that no excess costs could be attributed to the employer's unlawful conduct in that case. The present case established the general principle that excess organizational expenses are not ordinarily recoverable under the Act. In *Tiidee,* the Board found it unnecessary to consider whether an exception to that rule was warranted there, since the facts of that case showed that there were no such excess expenses.

C. Even if the court's reading of *Tiidee* were correct, it should have remanded the case to the Board for further consideration in light of that decision. By applying to this case its own version of the Board's

supposedly new remedial policy, the court improperly entered "the domain which Congress has set aside exclusively for the administrative agency" (*Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196).

ARGUMENT

I

THE COURT OF APPEALS MUST APPLY THE SAME STANDARDS IN REVIEWING A BOARD ORDER WHICH IS CHALLENGED AS INADEQUATE TO EFFECTUATE THE PURPOSES OF THE ACT AS IT APPLIES IN REVIEWING AN ORDER CHALLENGED AS GOING FURTHER THAN NECESSARY TO EFFECTUATE THOSE PURPOSES

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), empowers the Board, upon finding that an unfair labor practice has been committed, to order the violator to cease and desist and "to take such affirmative action * * * as will effectuate the polices of [the] Act." This section "charges the Board with the task of devising remedies" to accomplish the Act's purposes. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. "In fashioning its remedies under the broad provisions of § 10(c) * * *, the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 612, n. 32; see, also, *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 216. The Board's remedy thus may not be disturbed "unless it can be shown that the order is

a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U.S. 533, 540.

This special deference to the Board's choice of a remedy is a reflection of the "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co.* v. *Securities & Exchange Commission,* 329 U.S. 90, 112; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194. Agency orders are thus subject to judicial modification only "where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 613), or where it constitutes "a patent abuse of discretion" (*Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 414). The reviewing court may decide "only whether under the pertinent statute and relevant facts, the [agency] made 'an allowable judgment in [its] choice of the remedy'" (*Butz* v. *Glover Livestock Commission Co.,* 411 U.S. 182, 189).

Although the Court has enunciated these principles in cases where agency orders have been challenged as going too far, there is no reason why they should not also apply where, as here, the agency's order is challenged as not going far enough. In either situation the controlling consideration is that Congress has left it to the agency's discretion to determine what

relief is necessary to cure the violations found, and that discretion comprehends deciding not only what is necessary but also what is unnecessary. Drawing the outer limits of the remedy implicates no less important policy considerations than determining what minimum affirmative steps must be taken.

Respondent does not disagree. It has conceded that "the *same* standard is applicable whether the remedy is attacked as excessive or inadequate" (Br. in Op. 15, n. 8; respondent's emphasis). Its contention is that the Board's failure to prescribe the remedies sought by respondent was an abuse of its broad remedial discretion, and that the court of appeals therefore acted properly in enlarging the Board's order. As we demonstrate below, however, the Board did not abuse its discretion. If the court of appeals had applied the proper standard of review, it would have been constrained to uphold the Board's order without modification.

II

THE COURT OF APPEALS EXCEEDED ITS REVIEWING AUTHORITY BY ENLARGING THE BOARD'S REMEDIAL ORDER TO INCLUDE AN AWARD TO THE UNION OF LITIGATION AND ORGANIZATIONAL EXPENSES

A. THE BOARD DID NOT ABUSE ITS DISCRETION IN REFUSING TO AWARD LITIGATION EXPENSES

1. The Board reasonably determined that litigation expenses should not ordinarily be awarded as part of the remedy for unfair labor practices

The Board, in considering the union's request for an award of litigation expenses, reasoned that under the

statutory framework the Board has the "primary initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes,"[10] and that "[s]uch protection of the public interest as may result from the charging party's participation in litigation must be regarded * * * as incidental to its efforts to protect its own private interests" (Pet. App. 39A). The Board concluded that, "[g]iven this statutory framework, * * * the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable" (*ibid.*).[11]

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[10] "The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265.

[11] Under the traditional American rule, "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, *supra*, 386 U.S. at 717; see, also, *Hall* v. *Cole*, 412 U.S. 1, 4.

Unlike the National Labor Relations Act, which has no such provision, some federal regulatory statutes provide for mandatory recovery of litigation costs by a successful plaintiff who has the burden of bringing suit to enforce an award of the agency. See, *e.g.*, Packers & Stockyards Act, 7 U.S.C. 210(f); Perishable Agricultural Commodities Act, as amended, 7 U.S.C. 499g(b); Railway Labor Act, as amended, 45 U.S.C. 153 (p); Interstate Commerce Act, as amended, 49 U.S.C. 16(2). Other statutes permit allocating fees at the discretion of the court, based on the conduct of the parties. See, *e.g.*, Securities Act of 1933, as amended, 15 U.S.C. 77k(e). See, also, Note, *The Allocation of Attorney's Fees After Mills* v. *Electric Auto-lite Co.*, 38 U. Chi. L. Rev. 316, 318 (1971).

Thus, the Board, "acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application" (*Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 92). This general rule was properly based upon the Board's judgment that "it would not on balance effectuate the policies of the Act to require reimbursement with respect to such costs in the circumstances here" (Pet. App. 38A). As the Board correctly noted, moreover, its rule generally denying litigation expenses is consistent with the general principle applied by the courts in this country.

2. The Board's subsequent decision in Tiidee, establishing a limited exception to the general rule where a party asserts patently frivolous defenses to a charge of unfair labor practices, does not undercut the Board's rationale in the present case

The court below did not deny either that the Board's general rule disfavoring awards of counsel fees is reasonable or that the rule was reasonably applied in this case. It concluded, however, that the Board's supplemental decision in *Tiidee, supra,* had undercut its rationale for denying such expenses here. The court's conclusion is erroneous. *Tiidee* establishes a limited exception to the general rule enunciated in the present case; it reaffirms rather than undercuts the rationale of the decision here.

The Board found in *Tiidee* that the employer's defenses to the unfair labor practice charges were "patently frivolous" (A. 34–35); in awarding litigation expenses in that case, it carved out a limited exception

for such "frivolous litigation" (A. 34, 35). The Board stated in *Tiidee* (A. 35–36):

> Normally, as the Board recently noted, litigation expenses are not recoverable by the charging party in Board proceedings even though the public interest is served when the charging party protects its private interests before the Board. [Citing the instant case.]
>
> * * * [H]owever, * * * frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to order Respondent to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases * * *.

Where, as in *Tiidee,* the proffered defense to charges of unfair labor practices is frivolous, no legitimate private interest is served by permitting the defense to be freely asserted. On the other hand, where the employer, though charged with serious misconduct, tenders a plausible and substantial defense, the public interest in "uncrowded Board and court dockets" (A. 36) and the private interest of the charging party in

avoiding unnecessary litigation expenses collide with the right of the employer to obtain an adjudication of the issues he presents. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited review." *Golden State Bottling Company* v. *National Labor Relations Board,* No. 72-702, decided December 5, 1973, slip op. 12, quoting from *National Labor Relations Board* v. *Teamsters Local 449,* 353 U.S. 87, 96.

The Board's balancing of the competing public and private interests is reasonable. It has determined that, regardless of how serious the unfair labor practice charge or how aggravated the alleged conduct, a party should not be deterred from presenting substantial defenses. When "patently frivolous" (A. 34-35) defenses are asserted, however, the purposes of the Act are furthered by awarding litigation expenses "in order to discourage future frivolous litigation" (A. 36) and thereby to help maintain "speedy access" (A. 35-36) to the Board.[12]

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[12] The distinction between frivolous and non-frivolous litigation has long been the basis of attorneys' fees awards by the federal district courts as well. It is settled that a district court may award counsel fees "where an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 *Moore's Federal Practice,* ¶ 54.77[2], p. 1709 (2d ed., 1972); see, also, *Newman* v. *Piggie Park Enterprises, Inc.* 390 U.S. 400, 402, n. 4; *Hall* v. *Cole,* 412 U.S. 1, 5.

The Court of Appeals for the First Circuit has awarded attorneys' fees under Rule 38 of the Federal Rules of Appellate

Continued

Thus, nothing in the Board's *Tiidee* decision undercuts its rationale for denying litigation expenses in the present case. Heck's defense to the refusal-to-bargain charge was that it entertained a good faith doubt about the union's majority status. Though both the Trial Examiner and the Board ultimately determined that the union in fact represented a majority of the store employees (A. 13–16; Op. App. 2a), the Board reasonably concluded that Heck's contentions, unlike the "patently frivolous" defenses of the employer in *Tiidee,* were "debatable" and not "clearly meritless on their face" (Pet. App. 37A).[13] Heck's "introduced testimony which if fully credited and given its broadest possible sweep, would have resulted in the rejec-

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Continued

Procedure where a party's defenses to a Board enforcement proceeding were wholly without merit. See *National Labor Relations Board* v. *Smith & Wesson*, 424 F. 2d 1072, 1073; *National Labor Relations Board* v. *United Shoe Machinery Corp.*, 445 F. 2d 633, 635. Cf. *National Labor Relations Board* v. *Sauk Valleg Mfg. Co.*, C.A. 9, No. 72–1569, decided October 29, 1973, slip op. 9. Rule 38 provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

[13] Though these statements appear in the section of the Board's decision dealing with the union's request for reimbursement for the loss of collective-bargaining benefits (Pet. App. 36A–37A; see note 5, *supra*), the Board's conclusions there about the substantiality of Heck's defenses nonetheless bear on the question whether *Tiidee* requires a different result with respect to counsel fees in this case. The Board had no reason here to reiterate in the section of its decision on litigation expenses that Heck's claims were debatable, since it was not then addressing possible exceptions to its general rule denying such expenses. It did, however, rest its decision of this case on "the circumstances here" (Pet. App. 38A); it concluded that the Act's purposes would not be served by allowing the union its counsel fees "in this litigation" (Pet. App. 39A).

tion of sufficient cards to have vitiated the Union's majority claim" (*ibid.*).[14]

The court of appeals expressed no doubt about the propriety of the Board's distinction between frivolous and non-frivolous litigation;[15] nor did it question the Board's conclusion that Heck's defenses were substantial. It apparently construed the *Tiidee* decision, however, to require an award of litigation expenses

[14] Similarly, although the Board ultimately concluded that the evidence supported an inference that Heck's had no good faith doubt of the union's majority status (and therefore that a Section 8(a)(5) violation had been established) (Op. App. 2a–5a), the substantiality of Heck's contention that its doubt was in good faith is demonstrated by the Trial Examiner's finding that the evidence did not show an 8(a)(5) violation (A. 17). The Trial Examiner was "particularly influenced by the fact that in prior cases the Company's challenge to card majorities proved well-founded" (*ibid.*). He stated that, in view of Heck's prior successes in disputing the union's majority status, its "reluctance to recognize the Union pursuant to the latter's claim of a majority based on authorization cards is certainly understandable, to say the least" (*ibid.*).

Heck's also presented substantial factual defenses to the Section 8(a)(1) charges of improperly threatening and polling its employees. Some of those defenses were sustained by the Trial Examiner (A. 11–12); others were rejected on the basis of the Examiner's resolution of the "conflicts in the testimony" (A. 8).

[15] The court below has recognized in other cases that extraordinary remedies for unfair labor practices may be applicable to violators who present frivolous defenses but not to those whose contentions are debatable. See *Retail Clerks Union Local 1401* v. *National Labor Relations Board* (*Zinke's Foods, Inc.*), 463 F. 2d 316, 325; *Southwest Regional Joint Board, Amalgamated Clothing Workers* v. *National Labor Relations Board* (*Levi Strauss & Co.*), 441 F. 2d 1027, 1036; *United Steelworkers* v. *National Labor Relations Board* (*Quality Rubber Mfg. Co.*), 430 F.2d 519, 521–522.

whenever a violator's *conduct,* regardless of the merit of its defenses, is "clearly aggravated and pervasive" (Pet. App. 10A). The court stated, referring to *Tiidee* (*ibid.*):

> It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board.

As we have shown, however, the standard the Board announced in *Tiidee* was based not on a violator's conduct but on the substantiality of the defenses he asserts in Board litigation. The purpose of the award of litigation costs, as stated by the Board, was "to discourage future frivolous *litigation*" (A. 36; emphasis added). There is nothing in the *Tiidee* decision that supports the court of appeals' inference that an employer like Heck's, whose unfair labor practices are determined to be "aggravated and pervasive" (Pet. App. 29A) when viewed in terms of its past antiunion activities, but whose litigating position in the particular case is substantial, must reimburse the union's litigation costs.[16]

[16] Subsequent to its supplemental decisions in this case and in *Tiidee*, the Board decided another case involving *Tiidee Products, Inc.* (196 NLRB No. 27, decided April 6, 1972). It found there that the company, subsequent to its unlawful conduct in the earlier case, engaged in further unlawful refusals to bargain and committed other violations of the Act. The Board found that the refusals to bargain were "so inextricably intertwined" with the first "refusal on frivolous grounds to bargain with the Union as to require the conclusion that it was part of the same pattern of patently frivolous litigation for the same unlawful object" (*id.* at 3).

The court's conclusion (Pet. App. 9A) that the Board in *Tiidee* had "departed from the rationale upon which its refusal of litigation expenses in this case is based" is thus unwarranted. The court, in effect, undertook to balance "the conflicting legitimate interests" in uncrowded dockets on the one hand and in the freedom to assert substantial defenses on the other hand in a manner different from that chosen by the Board. That balancing function, however, is properly committed to the Board, not the courts. See *Golden State Bottling Co.* v. *National Labor Relations Board, supra,* slip op. at 12; *National Labor Relations Board* v. *Teamsters Local 449, supra,* 353 U.S. at 96.

3. The Board's decision rests on its judgment of how best to effectuate the purposes of the Act, not on any misconception of the judicially-developed exceptions to the rule disfavoring awards of attorneys' fees

Respondent argues that the Board committed "an error of law" (Br. in Op. 18) in misconceiving the traditional American rule that "attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor" (*Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* 386 U.S. at 717). In respondent's view, the exceptions to that rule do "not distinguish between bad faith violations and bad faith defenses"; they require an award of "attorney's fees as well 'where the behavior of a liti-

The Board's order directed the payment of litigation expenses with respect to the later refusals to bargain as well as the other violations, because "we are unable to allocate the particular costs of litigating the refusal to bargain as distinguished from the other unfair labor practices" (*id.* at 4, n. 7). The decision is thus in accord with the principles developed in the Board's earlier decisions in the present case and in *Tiidee.*

gant has reflected a willful and persistent * * * defiance of the law' * * * as where the proffered defenses are frivolous" (Br. in Op. 18).

But even if the federal courts, in the exercise of their equitable powers, define the "bad faith" exception as respondent contends—awarding attorneys' fees in cases of bad faith violations as well as bad faith defenses[17]—it does not follow that the Board, in the exercise of its remedial authority under Section 10(c) of the National Labor Relations Act, must do likewise. "In evolving standards of fairness and equity, the [Board] is not bound by settled judicial precedents." *Securities & Exchange Commission* v. *Chenery Corp.*, *supra*, 318 U.S. at 89. As we have shown (pp. 15–21, *supra*), the Board's conclusion not to award litigation

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[17] Contrary to respondent's assertion, the cases it cites (Br. in Op. 18) do not establish that this "bad faith" exception applies where, as in this case, the losing party has not acted in bad faith in the litigation itself. In *Local No. 149, United Auto Workers* v. *American Brake Shoe Co.*, 298 F. 2d 212, 216 (C.A. 4), the court held that, in an action to compel compliance with an arbitration award, attorneys' fees will be awarded only where the losing party, "without justification, refuses to abide by the award * * *." The court denied the request for such fees because "there was justification for the litigation here involved." Similarly, in *Brewer* v. *School Board of City of Norfolk, Virginia*, 456 F. 2d 943 (C.A. 4), the court, while awarding attorneys' fees in a school desegregation suit on the theory that it benefited the entire class of students (*id.* at 951), declined to rest its award on the theory that the litigant's behavior "has reflected a wilful and persistent 'defiance of the law' " (*id.* at 949). The court ruled that the "bad faith" exception is inapplicable " 'where litigation was pursued on a matter as to which prior decisions left a lingering doubt' " (*ibid.*), and it found such doubt there (*id.* at 951).

In *Vaughan* v. *Atkinson*, 369 U.S. 527 (a suit in admiralty to recover maintenance and cure, and damages for failure to pay it), this Court found in effect that the shipowners—

expenses except where the litigation is frivolous is based upon a consideration of the structure and policies of the Act and rests on rational grounds.

The Board's reference to "the general and well-established principle that litigation expenses are ordinarily not recoverable" (Pet. App. 39A) does not imply an exclusive reliance on the substantial body of judicial decisions concerning the award of attorneys' fees. The Board did not "explicitly disavow * * * any purpose of going beyond [the standards] which the courts had theretofore recognized" (*Chenery Corp., supra,* 318 U.S. at 89). It merely invoked, in support of its own balancing of the conflicting public and private interests under the Act, the policy underlying the general American rule disfavoring awards of counsel fees.

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who were "callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it"—presented no substantial defense on the question of their liability for maintenance. The Court stated that "libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old" (*id.* at 530–531). The Court held that, in these circumstances, counsel fees could be recovered as an element of damages for failure to furnish maintenance and cure.

Siegel v. *William E. Bookhultz & Sons, Inc.*, 419 F. 2d 720 (C.A.D.C.), involved an application of the established principle that, in suits to enforce an insurer's duty to defend, "[t]he damages recoverable * * * include not only the adjudicated or negotiated amount of the claim and the insured's expenses in resisting it but also *any* additional loss legally traceable to the breach" (*id.* at 723: footnotes omitted and emphasis added). Rather than establishing a "fixed rule" (*id.* at 722) that counsel fees are always available in such suits as damages "legally traceable to the breach," the court held that, where the insurer's conduct in refusing to defend is especially oppressive, " 'overriding considerations of justice' " (*ibid.*) permit an award of attorneys' fees under the "legally traceable" standard.

B. THE BOARD DID NOT ABUSE ITS DISCRETION IN REFUSING TO AWARD EXCESS ORGANIZATIONAL EXPENSES

The Board denied the union's request for reimbursement of its excess organizational expenses allegedly incurred as a consequence of Heck's unlawful conduct. Though it acknowledged that there may have been some additional costs attributable to Heck's refusal to bargain (Pet. App. 38A), it concluded that considerations of the "role of a charging party under the statutory scheme" and "the basic principles * * * that Board orders must be remedial not punitive, and collateral losses are not considered in framing a reimbursement order" (Pet. App. 39A), made such an order inappropriate. "[I]n the circumstances here"—which included the presentation by Heck's of substantial factual defenses to the 8(a)(1) and 8(a)(5) charges—"[i]n our opinion it would not on balance effectuate the policies of the Act to require reimbursement" (Pet. App. 38A).

The court of appeals did not deny that these would be valid reasons for declining to award excess organizational expenses. As in the case of litigation costs, however, it concluded that "the Board, upon remand in *Tiidee,* has shifted its ground with respect to organizational costs" (Pet. App. 11A). Here, too, the court misinterpreted *Tiidee.*

In *Tiidee,* the Board denied organizational expenses on the ground that there were no excess costs attributable to the employer's unlawful conduct (A. 34–35). That determination is not inconsistent with the Board's determination here that, despite the probability that there were some excess organizational

costs, the Act's policy would not be furthered by ordering reimbursement in this case. The Board here enunciated the general principle that excess organizational expenses are not ordinarily recoverable under the Act. In *Tiidee,* the Board merely held, in effect, that it was unnecessary to consider whether an exception to that rule was warranted in that case, since the union had not in fact incurred any excess organizational expenses.

There is no basis for the court's inference (Pet. App. 11A) that, by deciding *Tiidee* on the ground that no excess organizational costs had been incurred, the Board had abandoned the general principle that such costs are not ordinarily recoverable. By an extension of the court of appeals' reasoning, where this Court determines that a person lacks standing to assert a claimed violation of the Fourth Amendment (*e.g., Brown* v. *United States,* 411 U.S. 223; *Alderman* v. *United States,* 394 U.S. 165), there is an implication that his claim would have been sustained had he been permitted to assert it. In neither case can such an inference fairly be drawn. That the union had incurred no excess organizational costs does not mean that, if it had incurred costs, it could have recovered them.

C. IN ANY EVENT, THE COURT OF APPEALS, BY AWARDING LITIGATION AND ORGANIZATIONAL EXPENSES ITSELF RATHER THAN REMANDING THE CASE TO THE BOARD, IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE BOARD ON THE APPROPRIATE REMEDY FOR THE UNFAIR LABOR PRACTICES IN THIS CASE

Even if the court of appeals' reading of *Tiidee* were correct and the Board has in fact changed its policy

with respect to awards of litigation and organizational expenses, the court below should not have undertaken to apply its version of that changed policy to the case before it. Rather, it should have remanded the case to the Board to give it an opportunity to consider whether and in what manner the change should affect the remedy in this case.[18] "[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20.[19]

The court of appeals thus exceeded its reviewing authority, because it improperly substituted its judgment of the appropriate remedy in this case for that of the Board. "For reviewing courts to substitute * * *

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[18] On further remand, the Board would have had an opportunity to consider, for example, whether the *Tiidee* ruling—if it in fact represented a change in policy—should be applied retroactively or, like some decisions of this Court that are designed to deter unlawful conduct, only prospectively.

[19] Respondent contends (Br. in Op. 12, 19) that a remand was not necessary, because the Board had already distinguished the two cases in its opinion in *Tiidee* and because the Board did not respond to respondent's motion in the court of appeals to lodge the *Tiidee* decision. But the discussion in the *Tiidee* decision, designed to show that the case was different from the present one, did not anticipate a holding by the court that the rationale of the Board's decision in this case had been undercut. The Board should have been given an opportunity to consider the appropriate remedial course in light of that holding.

The Board did not respond to respondent's pre-argument motion to lodge the *Tiidee* decision, because it had no reason to oppose that motion. Its position on respondent's inferences from the decision, argued in its memorandum supporting the motion to lodge, were made fully known to the court of appeals at oral argument.

their [own] discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.'" *National Labor Relations Board* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438, 444, quoting from *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 196.

CONCLUSION

The judgment of the court below should be reversed insofar as it enlarges the Board's order by awarding litigation and organizational expenses.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
MARK L. EVANS,
Assistant to the Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Deputy Associate General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

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